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BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAI'I

IN THE MATTER OF

Contested Case Hearing Re Conservation  
District Use Application (CDUA) HA-3568 for  
the Thirty Meter Telescope at the Mauna Kea  
Science Reserve, Ka'ohē Mauka, Hāmakua,  
Hawai'i, TMK (3) 4-4-015:009

Case No. BLNR-CC-16-002

THE UNIVERSITY OF HAWAI'I AT  
HILO AND TMT INTERNATIONAL  
OBSERVATORY, LLC'S JOINT  
RESPONSE TO MEHANA KIHOI'S  
PROPOSED FINDINGS OF FACT,  
CONCLUSIONS OF LAW, AND

**THE UNIVERSITY OF HAWAI'I AT HILO AND TMT INTERNATIONAL OBSERVATORY, LLC'S JOINT RESPONSE TO MEHANA KIHOI'S PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION ORDER  
FILED MAY 30, 2017 [DOC. 673]**

Applicant UNIVERSITY OF HAWAI'I AT HILO ("UH Hilo) and TMT INTERNATIONAL OBSERVATORY, LLC ("TIO"), through their respective counsel, hereby jointly submit this Response to Mehana Kihoi's Proposed *Findings of Fact, Conclusions of Law, and Decision Order, filed May 30, 2017 [Doc. 673]* ("Response").

**I. STANDARD OF REVIEW FOR REVERSAL OR MODIFICATION OF ADMINISTRATIVE FINDINGS, CONCLUSIONS, DECISIONS, OR ORDERS**

To prevent judicial reversal or modification of administrative findings of fact under § 91-14(g), Hawaii Revised Statutes ("HRS"), the Board of Land and Natural Resources ("BLNR") should, upon review of the record, reverse or modify findings that are "[c]learly erroneous in view of the reliable, probative, and substantial evidence on the whole record." *In re Gray Line Hawaii Ltd.*, 93 Hawai'i 45, 53, 995 P.2d 776, 784 (2000). A finding of fact is clearly erroneous when: (1) the record lacks substantial evidence to support the finding or determination; or (2) despite substantial evidence to support the finding or determination, the BLNR is left with the definite and firm conviction that a mistake has been made. *Kienker v. Bauer*, 110 Hawai'i 97, 105, 129 P.3d 1125, 1133 (2006).

Similarly, conclusions of law should be reversed or modified where the BLNR finds they are in violation of constitutional or statutory provisions, in excess of the statutory authority or jurisdiction of the Commission, or affected by other error of law. *Id.*

## II. DISCUSSION

### A. Responses to Mehana Kihoi's ("Kihoi") Proposed FOF and COL

The UH Hilo and TIO object to each of the FOF and COL in Kihoi's Proposed *Findings of Fact, Conclusions of Law and Decision and Order, filed May 30, 2017* [Doc. 673] ("Kihoi's Proposed FOF/COL") to the extent that they are irrelevant, inapplicable, immaterial, mischaracterize the evidence, misstate or misrepresent the record, rely on evidence that is not credible, biased, or incomplete, and/or not supported by the evidence. UH Hilo and TIO also object to Kihoi's Proposed FOF/COL to the extent they assert alleged "findings" that are beyond the scope of issues set forth in Minute Order No. 19.

Appendix A contains general objections to the Kihoi's Proposed FOF/COL, which UH Hilo and TIO hereby incorporate by reference to its response to each of Kihoi's FOF and COL, to the extent applicable.

In addition to the general objections in Appendix A, UH Hilo and TIO have prepared a table of specific responses and objections to Kihoi's Proposed FOF/COL, which is attached hereto as Appendix B. Citations to the evidence in the record provided herein are not intended to be exhaustive or comprehensive, but demonstrate evidentiary support for UH Hilo and TIO's responses and objections.

UH Hilo and TIO further object to Kihoi's Proposed FOF/COL to the extent they seek to challenge the FEIS for the TMT Project. This proceeding is not an EIS challenge under HRS Chapter 343; Kihoi's ability to make such a challenged expired long ago, and she cannot reopen the FEIS approval process through improper arguments of insufficiency under the statute and rules governing the EIS process. This proceeding is entirely governed by the applicable constitutional law and the Conservation District rules that are genuinely at issue here.

The FOF/COL and page numbers referenced herein are as provided in Kihoi's Proposed

FOF/COL. References to the UH Hilo and TIO's Joint [Proposed] Findings of Fact, Conclusions of Law, and Decision and Order on May 30, 2017 [Doc. 671] ("UH-TIO FOF/COL") are denoted by the prefixes "UH-TIO FOF" and "UH-TIO COL" for the numbered FOF and COL, respectively, in the UH-TIO FOF/COL.

Acronyms and defined terms used herein are defined in the Index of Select Defined Terms, which was filed as part of the jointly-submitted UH-TIO FOF/COL.

Any specific proposed finding or conclusion not specifically referred to or addressed below is deemed denied and disputed.

#### **B. Responses to Kihoi's Proposed Decision and Order**

Kihoi's proposed Decision and Order is not supported by the record. As set forth in the UH-TIO FOF/COL, substantial evidence has been adduced to show that the CDUA satisfies the eight criteria as set forth in Hawai'i Administrative Rule ("HAR") § 13-5-30(c)(1). The record also shows that the TMT Project is consistent with the UH Hilo's and the BLNR's obligations under the public trust doctrine, *Ka Pa'akai*, and Article XI, section I and Article XII, section 7 of the Hawai'i Constitution.

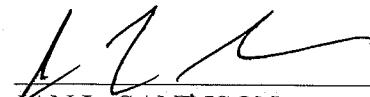
Ultimately, Kihoi is categorically opposed to the construction of TMT regardless of whether or not the TMT Project satisfies the eight criteria. No location on the mountain, and no combination of mitigation measures, will make the TMT Project acceptable to Kihoi. That position is not supported by the law.

#### **III. CONCLUSION**

For the reasons set forth herein and in the UH Hilo Pre-Hearing Statement, TIO's Pre-Hearing Statement, the UH-TIO FOF/COL, the testimony of the UH Hilo's and TIO's witnesses, the examination of the Petitioners' and Opposing Intervenor's witnesses, and in UH Hilo's and TIO's other filings, UH Hilo and TIO respectfully jointly request that the Hearing Officer adopt

the UH-TIO FOF/COL, and reject Kihoi's Proposed FOF/COL.

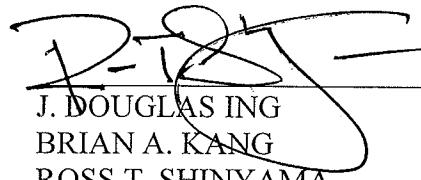
DATED: Honolulu, Hawai'i, June 13, 2017.



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## Appendix A

<b>General Responses to Petitioners'/Opposing Intervenors' Proposed Findings of Fact ("FOF") and Conclusions of Law ("COL")</b>	
<b>Citation does not support the proposition.</b>	The citation offered by Petitioners/Opposing Intervenors does not support the proposed FOF or COL.
<b>Estoppel/Improper Reconsideration</b>	The proposed FOF or COL or a portion thereof is improper to the extent it is barred by estoppel or waiver, or improperly seeks reconsideration of the Hearing Officer's or the BLNR's prior ruling,
<b>Inaccurate/False</b>	The proposed FOF or COL or a portion thereof is inaccurate or false.
<b>Incomplete.</b>	The proposed FOF or COL is materially incomplete.
<b>Irrelevant/Inapplicable.</b>	The information in the proposed FOF or COL is irrelevant or inapplicable in this contested case proceeding. <u>See</u> Minute Order No. 19 [Doc. No. 281].
<b>Lack of Jurisdiction</b>	The proposed FOF or COL exceeds the scope of the Hearing Officer's jurisdiction and/or delegated authority
<b>Mischaracterization.</b>	The proposed FOF or COL mischaracterizes legal authority or the contents of the record.
<b>Misleading. Partial quotation.</b>	The proposed FOF or COL contains a partial quote from legal authority or a document in the record, and the incompleteness of the quotation is likely to mislead the reader.
<b>Misleading. Presented out of context.</b>	The proposed FOF or COL presents law or information in the record out of context and/or in a way that is likely to mislead the reader.
<b>Misrepresentation</b>	The proposed FOF or COL affirmatively misrepresents legal authority or the contents of the record.
<b>Not credible.</b>	The proposed FOF or COL is not credible based on the totality of the evidence contained in the record and/or the demonstrated biases of the witness whose testimony is cited in support of the proposed FOF or COL.

<b>Not in dispute.</b>	Either (1) the proposed FOF or COL is not at issue in this proceeding, or (2) standing alone, the proposed FOF or COL is not objectionable. The designation of any individual proposed FOF or COL as “not in dispute” does not and should not be construed as an admission of said FOF or COL or a concession that said FOF or COL should be incorporated into the final FOFs and COLs. It also does not and should not be construed as assent to any inferences suggested or that may be suggested by Petitioners/Opposing Intervenors from, e.g., their misleading grouping or ordering of otherwise unrelated facts.
<b>Not in evidence.</b>	The proposed FOF or COL asserts “facts” and/or cites documents that are not in evidence.
<b>Unsupported/Unsubstantiated</b>	The proposed FOF or COL is not supported by information in the record or was not substantiated by the Petitioners/Opposing Intervenors through the contested case process.

## Appendix B

### Summary Table of Responses to Mehana Kihoi's Proposed FOF/COL

(NOTE – Kihoi's Proposed FOF/COL contains FOF and COL that are mis-numbered, or out of sequence; however, we have quoted Kihoi's Proposed FOF/COL exactly as filed for clarity and consistency)

FOF/ COL #	Page	FOF/COL	Response
1	2	<p>On April 20, 2015, Protectors of Mauna Kea delivered a petition to Governor David Ige's office with over 50,000 signatures of individuals, across the nation and statewide, in opposition to the Thirty Meter Telescope ("TMT") demonstrating a significant change in circumstance from the initial planning efforts of the proposed project. Published By Jennifer Simco Kelleher, Associated Press. Telescope opponents, members of Mauna Kea Hui and Mauna Kea 'Ohana, deliver petition to governor's office, Associated Press, Honolulu, HI, April 20, 2015 available at <a href="http://www.hawaiinewsnow.com/story/28851786/telescope-opponents-deliver-petition-to-governors-office">http://www.hawaiinewsnow.com/story/28851786/telescope-opponents-deliver-petition-to-governors-office</a>. (Last visited on May 25, 2017). Signers of the petition included but were not limited to, residents of Hawai'i, both Native Hawaiians and the general public. [2]</p>	<p>Misleading. Presented out of context.</p> <p>Not in evidence.</p> <p>Irrelevant/Inapplicable. Not material.</p>
2	2	<p>On December 2, 2015, the Supreme Court of Hawaii held Mauna Kea Anaina Hou, et al., the petitioners in the first contested case, were entitled to a contested case hearing. Mauna Kea Anaina Hou v. Bd. of Land &amp; Nat. Res., 136 Haw. 376, 363 P.3d 224 (2015) ("MKAH"). The court concluded BLNR violated their due process rights by granting a conditional permit to begin construction of the TMT prior to holding a contested case hearing. Id. The court vacated the permit and remanded the case to BLNR for further proceedings consistent with its opinion. Id.</p>	<p>Incomplete.</p> <p>Inaccurate/False.</p> <p>UH-TIO FOF ¶ 30, 34.</p>
3	2	<p>Despite objections by MKAH scrutinizing the selection process of the Hearing Officer, on March 31, 2016, BLNR issued a Minute Order providing notice that Riki May Amano was appointed as the Hearing Officer to oversee the contested case. March 31, 2016, Minute Order No. 1 at 001.</p>	<p>Incomplete.</p> <p>Mischaracterization.</p> <p>UH-TIO FOF ¶ 37.</p>

FOF/ COL #	Page	FOF/COL	Response
4	2	<p>In response to MKAH's objections, BLNR issued Minute Order 2. Minute Order 2 stated that BLNR met on February 26, 2016 as a part of, and to discharge its adjudicatory function governed by Haw. Rev. Stat. § 91-9. April 8, 2016, MO 2, Haw. Rev. Stat. ("HRS") § 91-9. To support the Chair's decision in selecting Amano as the Hearing Officer, the Board stated the action was justified because the board had previously authorized a contested case and delegated the management of the case to a hearing officer. Id. The Board stated they discussed the issue at the February 26 meeting and delegated the conduct of the contested case hearing to a hearing officer, pursuant to Hawaii Administrative Rules ("HAR") 13-1-32(b), and confirmed that the chairperson was authorized to engage the services of a hearing officer pursuant to law. April 8, 2016, Minute Order No. 2. at 003.</p>	<p>Mischaracterization. Misleading. Partial quotation. UH-TIO FOF ¶38.</p>
5	3	<p>Prior Notice of the February 26, 2016 meeting when the Board discussed and subsequently made agreements were never made public, nor was the public offered a meaningful opportunity to be heard. April 15, 2016, MKAH Minute Order No. 005 at 4-5.</p>	<p>Mischaracterization. Misrepresentation. Estoppel/Improper Reconsideration.  Under HRS § 92-6(a)(2), the "adjudicatory function exercised by a board and governed by sections 91-8 and 91-9 [regarding contested cases]" are exempt from the Sunshine Law, HRS Chapter 92. Ms. Kihoi does not provide any legal authority to support her claim that BLNR's adjudicatory functions in connection with the Contested Case Hearing ("CCH") is subject to the Sunshine Law of HRS Chapter 92.</p>

FOF/ COL #	Page	FOF/COL	Response
6	3	<p>In response to the appointment by Minute Order 1 and the subsequent Minute Order 2 by the board, which provided justification for its action, on April 15, 2016, Richard Naiwieha Wurdeman, attorney for MKAH, et al., filed a motion objecting to the selection process of the hearing officer on the grounds that the Department of Land and Natural Resources (“DLNR”), without any authorization from the board, and before the remand by the Third Circuit, posted notice on January 29, 2016 in search of an attorney to oversee the contested case contradicting the Board’s position that an agreement was made on February 26, 2016. April 15, 2016, MKAH Minute Order No. 005 at 3.[4] Further, MKAH asserts BLNR violated the sunshine law when it held the February 26, 2016 meeting to discuss the appointment of the hearing officer without providing prior notice of the meeting to the public and an opportunity to be heard. Id.</p>	<p>UH-TIO FOF ¶38.</p> <p>Mischaracterization.</p> <p>Misrepresentation.</p> <p>Estoppel/Improper Reconsideration.</p> <p>See response to proposed finding of fact 5, page 3, above.<sup>1</sup></p> <p>UH-TIO FOF ¶38.</p>
7	3	<p>On May 6, 2016, the Hearing Officer filed notice to schedule the first pre-hearing conference on May 16, 2016. May 6, 2016, MO 5. Notice was not filed timely pursuant to Haw. Rev. Stat. § 91-9.5, which requires the Hearing Officer to give written notice by registered or certified mail with return receipt requested at least fifteen days before the hearing. Haw. Rev. Stat. (“HRS”) § 91-9.5 (West). May 9, 2016, Minute Order No. 5 at 016</p>	<p>Inaccurate/False.</p> <p>HRS §91-9.5 applies only to a “hearing” and not to pre-hearing conferences.</p> <p>Ms. Kihoi did not timely challenge the setting of the May 16, 2016 pre-hearing conference set forth in Minute Order No. 5. She also fails to assert any prejudice. The parties to the CCH as of May 16, 2016 all appeared through legal counsel at the May</p>

<sup>1</sup> The numbering for the proposed findings of fact and conclusions of law restart within each section. Therefore, for purposes of clarity, cross-references to Kihoi’s proposed findings of fact and conclusions of law include both the numbered paragraph and page number, as provided in Kihoi’s Proposed FOF/COL.

FOF/ COL #	Page	FOF/COL	Response
8	3	<p>The second pre-hearing conference was held on June 17, 2016 in Hilo.</p> <p>May 27, 2016, Minute Order No. 08. at 049. The Hearing Officer provided no guideline on expectations of the parties to prepare for the hearing. TR VOL III Titled: “Request for Admission and Motions”. At the conference, the Hearing Officer and the parties discussed several important matters including the number of witnesses parties would call to testify, the date to schedule the site inspection, deadlines for pre-hearing motions and deadlines for subpoenas. Id. The new parties were expected to discuss or state their case including how many witnesses they would have at this hearing, when they had no previous warning or access to any motions filed and were not informed that they needed to be prepared with that information. Id. All new parties except TIO and PUEO were pro se. Id. The Hearing Officer stated she would file a minute order describing the filing procedures. TR VOL III Titled: “Request for Admission and Motions” - P 7: 4-6. That minute order was never filed or provided to the parties.</p>	<p>16, 2016 pre-hearing conference.</p> <p>Inaccurate/False.</p> <p>Incomplete.</p> <p>Mischaracterization.</p>
9	4	<p>The remanded Contested Case Hearing was held over the course of 44 days from October 2016 to March 2017.[5]</p>	<p>UH-TIO FOF ¶¶40, 41, 45, 46, 47, 54.</p> <p>Incomplete.</p>
10	4	<p>In or about March 2016, the University filed its application for a Conservation Use District Permit (“CDUA”), the same application it submitted in or about September 2010, with no changes, to construct the</p>	<p>UH-TIO FOF ¶¶88, 89.</p> <p>Incomplete.</p> <p>Mischaracterization.</p>

FOF/ COL #	Page	FOF/COL	Response
		TMT at the Mauna Kea Science Reserve (“MKRSR”), Ka’ohe Mauka, Hamakua, with Hawai‘i TMK (3) 4-4-015:009. University of Hawaii Conservation Use District Application (“UH-CDUA”), Pages 1-541.	Misleading. Presented out of context.  Ms. Kihoi also provides no evidentiary support for her claim of “Public Outcry” as claimed in the title to Section I.D.  UH-TIO FOF ¶¶31, 32, 33, 34, 347.
11	4	The University did not incorporate any information or consult with the community to address the national and statewide efforts against the project. [6]	Inaccurate/False.  Misrepresentation.  Unsupported/Unsubstantiated.
12	4	James Hayes, the author of the CDUA, was not a credible witness. He testified that the entire conservation use district will have “minimal overall” damage due to the TMT. HAYES, Volume III, Page 48. Line 24. Hayes’ statements directly contradict the Federal Environment Impact Statement issued by National Environmental Policy Act (“NEPA”) which states, ““the cumulative impact of 30 years of astronomy development has resulted in significant, adverse and substantial impact to the cultural and natural resources of Mauna Kea. UHH EIS 4 at 457. “Observatory construction has resulted in the moving of more than 10,000 cubic yards of material, grading and flattening of Kukahau’ula ridges, and placement of man-made structures on Kukahau’ula, affecting views to and from the summit. Ex.A005 FEIS V3 p. 3-214. The development of observatories within the Astronomy Precinct substantially altered the appearance of the summit, and the presence of observatories continues to affect the performance of the religious and cultural practices. Id. Further, when asked	UH-TIO FOF ¶¶210 through 237 (evidence of substantial and extensive consultation).  Inaccurate/False.  Mischaracterization.  Estoppel/Improper Reconsideration.  Unsupported/Unsubstantiated.

FOF/ COL #	Page	FOF/COL	Response
			UH-TIO FOF ¶¶373, 425, 428, 430, 432, 445, 474, 677, 771, 780, 782, 784, 791, 795, 822, 824, 839, 880, 908, 968, 969, 970, 971, 983, 999.
		UH-TIO COL ¶192.	UH-TIO COL ¶¶386 through 391 (untimely challenges to FEIS must be rejected).
13	4		Inaccurate/False.  Misrepresentation.  Unsupported/Unsubstantiated.
			UH-TIO FOF ¶¶210 through 237 (evidence of substantial and extensive consultation).  UH-TIO COL ¶¶386 through 391 (untimely challenges to FEIS must be rejected).
14	5		Incomplete.  UH-TIO FOF ¶¶40 through 53.
15			Incomplete.  UH-TIO FOF ¶¶40 through 53.

FOF/ COL #	Page	FOF/COL	Response
16	5	On May 16, 2016, Perpetuating Unique Educational Opportunities (“PUEO”) filed a motion to intervene as a party to the contested case asserting standing as Native Hawaiian cultural practitioners. May 16, 2016, PUEO Minute Order 33 at 1.	Incomplete.  UH-TIO FOF ¶¶40 through 53.
17	5	In response to this, on July 18, 2016, Kihoi filed a motion to exclude PUEO as a party on the basis that the Executive Director, Keahi Warfield, (“Warfield”) had a material and direct business interest to BLNR member Stantely Roehrig (“Roehrig”). July 18, 2016, Kihoi Minute Order No. 98 at 1-17.	Citation does not support the proposition. There is no Minute Order No. 98. Kihoi apparently meant to cite Doc. 98, which is her Motion to Deny the Intervention of Perpetuating Unique Educational Opportunities as a Party to the Contested Case Hearing (“Motion to Deny PUEO Intervention”).
18	5	Warfield is the President of PUEO and the Executive Director of Keaukahoa One Youth Development (“KOYD, a 501(c)(3) non-profit organization. Id.	Citation does not support the proposition. Kihoi apparently cites to her Motion to Deny PUEO Intervention as the evidence supporting this proposed finding of fact. Her Motion to Deny PUEO Intervention is not evidence.
19	5	As Executive Director of KOYD, Warfield and Roehrig shared the same business space according to the Department of Commerce and Consumer Affairs at the time of filing the motion to exclude PUEO as a party. Id. At the same time, Roehrig maintained authority to approve or deny the CDUA. July 18, 2016, Kihoi Minute Order No. 98 at 1-17. On August 1, 2016, TIO filed an objection to Kihoi’s request to exclude PUEO. August 1, 2016, TIO Minute Order No. 145 at 1.	<u>See response to proposed finding of fact 18, page 5, above.</u>  Estoppel/Improper Reconsideration. Minute Order No. 28 [Doc. 351].

FOF/ COL #	Page	FOF/COL	Response
20	6	On October 10, 2016, the Hearing Officer issued Minute Order 28 denying Kihoi's motion to exclude PUEO as a party despite compelling evidence demonstrating business ties between Roehrig and Warfield. October 10, 2016, Minute Order No. 327 at 1. <sup>[8]</sup>	Estoppel/Improper Reconsideration.
21	6	On October 15, 2016, Kihoi filed a motion for reconsideration to deny the intervention of PUEO based on new and substantial information that was not available at the time the first motion was filed. The new and relevant information demonstrated a direct financial relationship between Warfield and Roehrig to which Roehrig and Warfield directly benefited from. Id.	Citation does not support the proposition. There is no Minute Order 380. Kihoi apparently meant to cite Doc. 380, which is her Motion for Reconsideration of the denial of her Motion to Deny PUEO Intervention ("Reconsideration Motion"). Her Reconsideration Motion is not evidence. Moreover, it was denied pursuant to Minute Order No. 60 [Doc. 683].
22	6	Roehrig received thousands of dollars in property tax savings from this relationship because KOYD leased lands from Roehrig and operated its business from those lands. October 15, 2016, Kihoi Minute Order No. 380 at 1-117.	Inaccurate/False. Misleading. Presented out of context. Not material.
			Mr. Warfield testified that his non-profit organization Keaukaha One Youth Development ("KOYD") has leased property from Makani Kai since 2011. Makani Kai is owned by the Roehrigs. See Tr. 2/15/17 at 216:14-217:6; 217:15-218:9. Jan Roehrig previously served as one of the Executive Directors for KOYD. See id. at 218:11-17. Mr. Warfield that he does not know "exact amounts[,"] but he is sure that KYOD received some tax breaks as a result of their lease to KOYD. See id. at 219:18-220:4.

FOF/ COL #	Page	FOF/COL	Response
			<p>The Hearing Officer granted PUEO's motion to intervene as a party in this CCH under HAR § 13-1-31(c), finding that "PUEO's participation will substantially assist the Hearing Officer in her decision making." Minute Order No. 13 [Doc. 115] at 3-4. PUEO's participation in this CCH did substantially assist the Hearing Officer in her decision making. None of the above testimony from Mr. Warfield changes this fact.</p> <p>Estoppel/Improper Reconsideration  The Hearing Officer has twice denied Kihoi's attempt to exclude PUEO from these proceedings. Estoppel/Improper Reconsideration. Minute Order No. 28 [Doc. 351]; Minute Order No. 60 [Doc. 683].</p>
23	6		<p>Warfield also stated KOYD is a beneficiary of funding from TMR's Think Tank program. Tr. Feb. 15, 2017 vol. 36 pg: 220, 4:05 7:4:06 14.[9] Despite the new and relevant information, the Hearing Officer never issued a Minute Order to deny or grant Kihoi's motion for reconsideration. Instead, she allowed the case to proceed even though there was enough information in the record to cause doubt on to whether Roehrig could not be influenced as a decision maker by the business relationship.</p> <p>Misleading. Presented out of context. Not material. Mischaracterization.</p> <p>Ms. Kihoi conveniently neglects to mention that the Pauahi Foundation and the Hawaii Community Foundation, not TIO, decides which local organizations received THINK Fund monies. See UHH-TIO FOF ¶300. Mr. Warfield testified that the decision to grant KOYD money from the THINK Fund is made by the Hawaii Community Foundation, not TIO. See Tr.</p>

FOF/ COL #	Page	FOF/COL	Response
			2/15/17 at 236:22-237:8.  <u>See response to proposed finding of fact 22, page 6, above.</u>
24	6	On September 22, 2016, Kihoi visited the site for the proposed TMT with the Hearing Officer and other parties involved in the contested case. However, was not allowed to participate, due to the fact that Kihoi requested to travel in own vehicle. September 22, 2016, BLNR Minute Order No. 279. No cultural protocol was done during the site visit. Id.	Mischaracterization. Not material.  Ms. Kihoi chose not to participate in the site visit.  UH-TIO FOF ¶68 through 73.
1	6	Kihoi is a Native Hawaiian spiritual, religious and cultural practitioner of Mauna Kea and other neighboring areas on the island of Hawai‘i. (Tr. Feb. 14, 2017 vol: 35 pg:98, 1:11 11- 20, Affidavit by Mehana Kihoi at 1 (“Exhibit 1”), Exhibit F-1, WDT pg:1 p:1).	It is not in dispute that Ms. Kihoi is a native Hawaiian practitioner; however, the credible and substantial evidence in the record demonstrates that Ms. Kihoi did not start conducting practices on Mauna Kea until 2012. <u>See UHH-TIO FOF ¶744.</u>  Prior to the groundbreaking ceremony on October 7, 2014, Ms. Kihoi had never been to the proposed TMT Project area. <u>See id.</u> Her purported practices after the groundbreaking ceremony do not constitute the reasonable exercise of any alleged cultural practice and is not a reason to deny the CDUA. She has also been able to conduct her practices on Mauna Kea in the presence of the 13 existing telescopes, paved roads, and power and telecommunication lines. <u>See id.</u>
2	7	She, and her daughter, are direct lineal descendants of Pā‘ao and Hewa Nui, the ancestral guardians of Mauna Kea, and their traditional	<u>See response to proposed finding of fact 1, page 6, above.</u> Not material or otherwise

FOF/ COL #	Page	FOF/COL	Response
3	7	practices. (Exhibit F-1, WDT pg:1 p:1).	do not dispute certain individuals' belief.
4	7	Pā‘ao and Hewa Nui were voyagers who received consent from ali‘i to care for, and gather adze on Mauna Kea. (Exhibit F-1, WDT pg:1 p:1). Id.	See response to proposed finding of fact 1, page 6, above.
5	7	The lands included within the Mauna Kea Science Reserve are a part of the Public Lands Trust, lands ceded by the U.S. as a condition of Statehood to be used for public trust purposes including, but not limited to, bettering the “conditions for Native Hawaiians, as defined by the Hawaiian Homes Commission Act.” (UHH-CDUA at 12, Haw. Const. Art. XII, § 4).	Irrelevant/Inapplicable. UHH-TIO dispute that the Public Trust Doctrine applies to the TMT Project. Nevertheless, even if it does apply, the TMT Project complies with the Public Trust Doctrine. See UHH-TIO FOFOF 1001-1014; UHH-TIO COL ¶ 295-323.
6	7	Kihoi is a Native Hawaiian beneficiary as defined by the Hawaiian Homes Commission Act of 1921 with the fifty percent (50%) blood quantum. Tr. Feb. 14, 2017 vol: 35 pg:76, 11:04 23 – 10, Haw. Const. art. XII, § 2 (West, Westlaw through 2017), HHCA §§ 201(a), 207(a) (West, Westlaw through 2017) [“HHCA”], H.R. Rep. No. 102-893, at 1 (1992). (Exhibit F-1, WDT pg:1 p:1)	Irrelevant/Inapplicable. Not material.
7	7	Kihoi is a beneficiary of the Public Lands Trust. Haw. Const. Art. XII, § 4. (Tr. Feb. 14, 2017, vol:35 pg:77, at 11:04 4).	See response to proposed finding of fact 4, page 7, above.
8	7	She is dedicated to the protection and preservation of the sacredness of the summit of Mauna Kea for ancestral, religious, cultural and spiritual purposes. (Exhibit F-1, WDT pg:1 p:3, Tr. Feb. 14, 2017, vol:35 pg:118, at 1:28 21 - 1:30 3).	See response to proposed finding of fact 1, page 6, above.
9	7	Kihoi has a close and significant relationship to Mauna Kea since birth. (Tr. Feb. 14, 2017, vol:35 pg:98, at 11:06 1 - 9, Tr. Feb. 14, 2017, vol:35 pg:109 at 1:10 3 - 10). Id.	See response to proposed finding of fact 1, page 6, above.
			See response to proposed finding of fact 1, page 6, above.

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10	7	As a direct lineal descendant of the guardians of Mauna Kea, Kihoi's objective is to protect traditional and customary practices not only for herself, but for her daughter and future generations of native Hawaiians and cultural practitioners. (Exhibit F-1, WDT pg:1 p:1, Exhibit F-28).	<p>Unsupported/Unsubstantiated.</p> <p>UH-TIO FOF ¶¶744, 745, 863, 956.  <u>See response to proposed finding of fact 1, page 6, above.</u></p>
11	7	<p>Kihoi engages in traditional and customary practices on Mauna Kea. Id. at 2. Among these traditional and customary practices are: mālama ‘āina, offering ho`okupu (including pule, oli and materials), healing, gathering adze, building ahu, connecting with her ancestors and participating in religious ceremonies. (Exhibit 1. at 2, Exhibit F-1, WDT pg:1 p:1, Tr. Feb. 14, 2017, vol:35 pg:92, at 11:30 9 - 11:32 8, Tr. Feb. 14, 2017, vol:35 pg:98, at 1:22 16 -18).</p>	<p>See response to proposed finding of fact 1, page 6, above. Ms. Kihoi presented no evidence that any of her alleged customary and traditional practices occur in area E of Mauna Kea. Indeed, as noted above, Ms. Kihoi testified at the CCH that she had never been to the proposed TMT Project site until the groundbreaking ceremony on October 7, 2014. Her purported practices after the groundbreaking ceremony do not constitute the reasonable exercise of any alleged cultural practice and is not a reason to deny the CDUA.</p>
			<p>Like she has previously practiced in the presence of 13 telescopes, the credible and substantial evidence in the record demonstrates that Ms. Kihoi will be able to continue her alleged customary and traditional practices even if the TMT Project is built.</p>

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12	8	<p>Kihoi and her daughter attend monthly religious ceremonies on Mauna Kea at the proposed site of the TMT and the neighboring spaces within the Conservation District Use area. (Exhibit 1 at 2-3, Tr. Feb. 14, 2017, vol:35 pg:98, at 1:11 11 - 20).</p>	<p>UH-TIO FOF ¶¶744, 745, 863, 956.</p> <p>Ms Kihoi admitted that she had never been to the proposed TMT Project site until the groundbreaking ceremony on October 7, 2014. Consequently, any alleged “monthly religious ceremonies” at the TMT Project site only occurred after its selection. References to her purported practices after the groundbreaking ceremony do not constitute the reasonable exercise of any alleged cultural practice and is not a reason to deny the CDUA.</p>
13	8	<p>Kihoi and her daughter have suffered cultural, psychological and physical injuries due to the existing structures on Mauna Kea. (Exhibit F-1, WDT pg:1 p:5, Tr. Feb. 14, 2017 vol:35 pg:98, 1:22 4 - 1:26 7).</p>	<p>UH-TIO FOF ¶¶744, 745, 863, 956.</p> <p>Unsupported/Unsubstantiated.</p> <p>Ms. Kihoi claimed psychological, emotional, other injuries as a result of being arrested on Mauna Kea. Ms. Kihoi chose to be arrested. Ms. Kihoi admitted to standing in the road to block vehicles from accessing the TMT Project site. Others, including Petitioners E. Kalani Flores and Pua Case, have “protected” Mauna Kea without being arrested. See Tr. 2/15/17 at 179:1-19; UH-TIO FOF 956. Furthermore, Ms. Kihoi’s alleged injuries from <i>existing structures</i> are not attributable to the TMT Project which has yet to be built.</p>

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			Criterion 8 in HAR § 13-5-30(c)(8) provides that “[t]he proposed land use will not be detrimental to the public health, safety, and welfare.” The credible and substantial evidence in the record demonstrates that the TMT Project will not be materially detrimental to the public health, safety, and welfare, in satisfaction of HAR § 13-5-30(c)(8). See UHH-TIO FOF ¶¶937-1000; UHH-TIO COL ¶¶273-293. Otherwise, the proposed finding on personal health issues is not material to the issues in dispute.
14	8	Kihoi and her daughter have suffered cultural, psychological and physical injuries due to the arrests by the Department of Land and Natural Resources on April 2, 2015 and on June 24, 2015 on Mauna Kea. Tr. Feb. 14, 2017 vol:35 pg:79, at 11:08 3 - 10, Exhibit F-11, Exhibit F-25, Exhibit F-26, Tr. Feb. 14, 2017 vol:35 pg:83, at 11:15 21 - 11:18 16).	<u>See response to proposed finding of fact 13, page 8, above.</u>
15	8	The arrests caused Kihoi and her daughter emotional distress while they asserted their rights to protect and preserve Mauna Kea. (Tr. Feb.14, 2017 vol:35 pg:79, 11:08 3 - 10, Tr. Feb. 14, 2017 vol:35 pg:83, at 11:15 21 - 11:18 16).	<u>See response to proposed finding of fact 13, page 8, above.</u>
16	8	Kihoi and her daughter suffer from extreme psychological distress in anticipation of the potential construction of the TMT. (Tr. Feb.14, 2017 vol:35 pg:98, at 11:42 9 - 11:44 24).	<u>See response to proposed finding of fact 13, page 8, above.</u>
17	8	They will suffer a substantial and imminent injury should the TMT proceed. (Exhibit F-1, WDT pg:1 p:6, (Tr. Feb.14, 2017 vol:35 pg:77, at 11:04 5 - 10). Id.	<u>See response to proposed finding of fact 13, page 8, above.</u>
18	8	The TMT is a threat to Kihoi and her daughter's well-being. (Exhibit F-24, Exhibit F-25, Exhibit F-26, Exhibit F-27, (Tr. Feb.14, 2017 vol:35 pg:98,	<u>See response to proposed finding of fact 13, page 8, above.</u>

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19	8	Kihoi enjoys views of and from the summit of Mauna Kea and the beauty of the area. Id.	The credible and substantial evidence in the record establishes that an extensive analysis of viewplanes was conducted in connection with the TMT Project. <u>See</u> UHH-TIO FOF ¶¶775-795; WDT Hayes at 2-17. Based on this extensive analysis, it was concluded that the TMT Project will not have a substantial adverse impact on the visual resources of Mauna Kea. <u>See</u> WDT Hayes at 21-23.
1	8	The interests of Kihoi in the preservation of Mauna Kea are aesthetic, cultural, environmental, recreational, religious, and customary and traditional. Id.	Ms. Kihoi does not provide any evidence to dispute the extensive evidence of mitigation of impacts and otherwise, the proposed finding is not material to the issues in dispute.
2	9	The construction of the TMT will adversely impact Kihoi and her daughter, including her ability to fulfill her responsibility that was passed	<u>See</u> responses to proposed findings of fact 13, page 8, and 19, page 8 above. <u>See also</u> generally UHH-TIO FOF/COL detailing the credible and substantial evidence in the record that establishes no substantial adverse impact to natural resources in satisfaction of, <i>inter alia</i> , HAR § 13-5-30(c)(4). UHH-TIO FOF ¶¶433-489; UHH-TIO COL ¶¶177-217. <u>See</u> response to proposed finding of fact 1, page 8, above.

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			<p>down to her by her ancestors to preserve and protect the area, her ability to engage in traditional and customary practices as well as enjoy the natural beauty and quiet of the area. (Exhibit F-1, WDT pg:1 p:5, Tr. Feb.14, 2017 vol:35 pg:92, at 11:32 22 - 2, Tr. Feb.14, 2017 vol: 35 pg:109, at 1:10 3 - 1:11 10) Id.</p>
3	9	<p>The proposed observatory and other facilities covered by the application are located in the 11,288-acre MKSR (TMK 4-4-15.9) on the upper slopes of Hawai'i Island's Mauna Kea Volcano known as the Northern Plateau. UHH-CDUA at 12. The site where the proposed project is to be built is on five acres of land within MKSR marked as the conservation use district. Id.</p>	<p>Incomplete. The TMT Observatory will be located in the 525 acre Astronomy Precinct within the MKSR on Mauna Kea. The credible and substantial evidence in the record establishes that the Astronomy Precinct is already substantially or fully developed. <u>See</u> UHH-TIO FOF ¶851, 859-864; Tr. 1/30/17 at 234:5-8 (Kalani Flores testified that the Astronomy Precinct is "substantially developed"). For example, the Astronomy Precinct is already home to eight optical and/or infrared observatories and three submillimeter observatories. <u>See</u> UHH-TIO FOF ¶238.</p> <p>The TMT Observatory will occupy 5 acres on the 2,000 acre Northern Plateau. <u>See</u> UHH-TIO FOF ¶703. The Northern Plateau was chosen in large part to avoid the most culturally sensitive areas of the summit ridge. <u>See e.g.</u>, UHH-TIO FOF ¶308, 342.c. The Northern Plateau also already includes roads and facilities for the Submillimeter Array. <u>See</u> UHH-TIO FOF ¶783.</p>

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4	9	<p>The Applicant acknowledges that “this CMP does not address development plan issues related to future observatories, including whether new observatories should be located on Mauna Kea to support the astronomy program or if observatories should have their leases extended or be decommissioned.” Comprehensive Management Plan (“CMP”) at page 7-54.</p>	<p>UH-TIO FOF ¶¶238, 252.</p> <p>Irrelevant. Mischaracterization. “[T]he CMP manages resources.” Ex. A-9 at 7-55. It did not and was never meant to address “development plan issues related to future observatories.” <u>Id.</u> That is the purpose of the Design Review Process. See UHH-TIO FOF ¶¶172-178. Rather, “[t]he role of the CMP in considering future land use is to guide the evaluation of proposed projects from the standpoint of potential impacts to cultural and natural resources, and to provide management actions that can be adopted by BLMR as special conditions in any CDUPs that it may issue.” <u>Id.</u> Ms. Kihoi does not cite to any authority that required or requires the CMP to address the TMT Project.</p>
5	9	<p>First leased by the State of Hawai‘i to the University of Hawai‘i (UH or University) in 1968, the current lease on the MKSR expires in 2033. UHH-CUDA at 12.</p>	<p>UH-TIO FOF ¶¶136 through 158.</p> <p>See UH-TIO FOF ¶¶113 through 117 instead.</p>
6	9	<p>Applicants for a CDUP must comply with HAR 13-5-30 Conservation District Resource subzone and as such, uses on the land are subject to the Conservation District rules (HAR 13-5) and the eight (8) criteria required to issue a permit pursuant to HAR 13-5-30(b)(1)-(8). In addition, uses on the land are subject to the Mauna Kea Science Reserve Master Plan (UH 2000) and CMP and subplans (UH 2009a).</p>	<p>The approval of the CDUA is subject to the eight criteria in HAR § 13-5-30(c).</p> <p>The University is in compliance with the 2000 Master Plan, the CMP and its subplans. See generally UHH-TIO FOF/COL; UHH-TIO’s Response to the Flores-Case Ohana’s Proposed FOF/COL.</p>

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7	9	Lands administered by the DLNR as directed by BLNR are held in the Public Lands Trust. Id., Haw. Const. Art. XII, § 4.	<p>Irrelevant/Inapplicable. UHH/TIO dispute that the Public Trust Doctrine applies to the TMT Project. Nevertheless, even if it does apply, the TMT Project complies with the Public Trust Doctrine. See UHH-TIO FOF ¶ 1001-1014; UHH-TIO COL ¶ 295-323.</p> <p>Moreover, the Hawai‘i State Constitution, article XII, section 4, provides that such lands “shall be held by the State as a public trust for native Hawaiians <b>and the general public.</b>” (Emphasis added).</p>
20	9	Mauna Kea is considered a significant traditional cultural site. Comprehensive Management Plan for University of Hawaii (“CMP”) at page 5.	<p>Citation does not support the proposition. There is no page 5 in the CMP. <u>See Ex. A-9.</u> Nevertheless, it is not disputed that Mauna Kea is culturally significant to some Native Hawaiians.</p> <p><u>See also</u> UH-TIO FOF ¶ 611 through 774.</p>
21	10	The summit area of Mauna Kea, is a natural prehistoric resource that is significant to the creation of Native Hawaiians, their history and culture. CMP at 15.	<p>Citation does not support the proposition. There is no page 15 in the CMP. <u>See Ex. A-9.</u> To the extent, Ms. Kihoi was referring to page 3-15 of the CMP, the citation still does not support the proposition. The only mention of “prehistoric” on page 3-15 is in footnote 9, which states that archaeological evidence indicates that the Adze Quarry was used by prehistoric Hawaiians. <u>See id.</u> at 3-15, n. 9. The Adze Quarry is 2.25 miles from the</p>

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22	10	A number of traditional cultural practices are conducted on Mauna Kea. Id.	<p>TMT Project site. <u>See</u> Ex. C-18.</p> <p><u>See also</u> UH-TIO FOF ¶¶611 through 774.</p> <p>Mischaracterization. Misleading. Presented out of context. Vague and ambiguous as to location and type of practice. There is no dispute that cultural practices occur on Mauna Kea. However, there is no credible evidence to support the proposition that customary and traditional practices occur in the proposed location of the TMT Observatory. Indeed, Ms. Kihoi herself admitted that she had never even been to the proposed TMT Project area until the groundbreaking ceremony on October 7, 2014. <u>See</u> UHH-TIO FOF ¶744. Her purported practices after the groundbreaking ceremony do not constitute the reasonable exercise of any alleged cultural practice and is not a reason to deny the CDUA.</p> <p>The cultural practices that occur on Mauna Kea have continued in the presence of 13 existing telescopes, paved roads, and power and telecommunication lines. <u>See id.</u></p>
23	10	The traditional cultural practices conducted within the project area require silence and solace.	<p><u>See also</u> UH-TIO FOF 611 through 774.</p> <p>Unsupported/unsubstantiated. Ms. Kihoi does not cite to any evidence for this</p>

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			<p>proposition. <u>See</u> response to proposed finding of fact 22, page 10 above.</p>	
24	10	<p>The traditional cultural practices conducted within the project area also require uninterrupted view planes and sacred space. Id.</p>	<p>There is no credible evidence to support the proposition that customary and traditional practices occur in the proposed location of the TMT Observatory. Ms. Kihoi herself admitted that she had never even been to the proposed TMT Project area until the groundbreaking ceremony on October 7, 2014. <u>See</u> UHH-TIO FOF ¶744. Her purported practices after the groundbreaking ceremony do not constitute the reasonable exercise of any alleged cultural practice and is not a reason to deny the CDUA.</p>	<p>Unsupported/Unsubstantiated. There is no credible evidence to support the proposition that customary and traditional practices occur in the proposed location of the TMT Observatory. Ms. Kihoi herself admitted that she had never even been to the proposed TMT Project area until the groundbreaking ceremony on October 7, 2014. <u>See</u> UHH-TIO FOF ¶744. Her purported practices after the groundbreaking ceremony do not constitute the reasonable exercise of any alleged cultural practice and is not a reason to deny the CDUA.</p>

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			<u>See UH-TIO FOF ¶¶611 through 774. See response to proposed finding of fact 22, page 10 above.</u>
26	10	The proposed project involves the construction, installation and operation of a Thirty Meter Telescope and ancillary facilities to support the TMT on five (5) acres of land with MKRA. UHH-CDUA at 12.	Incomplete. <u>See response to proposed finding of fact 3, page 9, above.</u>
25	10	The proposed project involves the construction, installation and operation of a Thirty Meter Telescope and ancillary facilities to support the TMT on five (5) acres of land with MKRA. UHH-CDUA at 12.	<u>See response to proposed finding of fact 26, page 10, above.</u>
26	10	The evidence is overwhelming that the project would have substantial, adverse, long-term impacts on a cultural site and traditional and customary practices. The University's consultant concluded that "the overwhelming evidence, from a cultural and traditional standpoint, points toward a significant adverse impact on Native	Inaccurate/False. Misrepresentation. Unsupported/Unsubstantiated. Ms. Kihoi does not identify the "University's consultant" she refers to nor does she provide a cite for her proposition. The credible and substantial evidence in the record supports the opposite conclusion. <u>See UH-TIO FOF ¶¶611-774. See also response to proposed finding of fact 24, page 10, above.</u>
27	10	The evidence is overwhelming that the project would have substantial, adverse, longterm impacts on a cultural site, traditional and customary practices and cause an imminent injury to those who share a close and significant relationship to Mauna Kea.	Inaccurate/False. Misrepresentation. Unsupported/Unsubstantiated. Ms. Kihoi again does not provide any cites or evidence for her proposition. The credible and substantial evidence in the record supports the opposite conclusion. <u>See UH-TIO FOF ¶¶611-774. See also responses to proposed findings of fact 24, page 10, and 13, page 8, above.</u>
28	10	Dr. Maile Tauali'i holds a doctorate in Health Services, with expertise in public health informatics, epidemiology, genetics and Indigenous health,	Unsupported/Unsubstantiated. Dr. Tauali'i's testimony is not credible and

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			<p>and is an expert in health for Native Hawaiians. Taualii Written Direct Testimony at 1 (“Exhibit 2”). Taualii testified that desecration of a sacred place such as Mauna Kea can create emotional or spiritual harm leading to physical manifestations harm to the body. Tr. Jan. 24, 2017 vol: 29 pg: 30, 9:32 15-19. Thus, when desecration occurs, the people impacted are not able to follow their beliefs. Exhibit 2 at 1. Taualii contends this, in turn, affects their cultural identity, and causes the link between the sacred space and the people to become disrupted. Id. As such, when this link is strained or broken, health is affected. Id. By not being able to fulfill stewardship/covenant it breaks or harms that connection/relationship. Id.</p>
29	11		<p>The alleged observations are not scientifically or logically verifiable and not demonstrated by admissible evidence, or otherwise the weight given to such testimony and exhibits is of little significance due to its lack of reliable probative value and/or materiality in connection with the criteria or legal issues to be resolved in this case.</p> <p>See response to proposed finding of fact 28, page 10, above.</p>
30	11		<p>Unsupported/Unsubstantiated. Dr. Kaholokula’s testimony is not credible and insufficient to support a finding that the TMT Project will have materially detrimental impacts to the physical health</p>

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		for). Tr. Feb. 23, 2017, vol: 40 pg: 118, at 8 – 19.	of Native Hawaiians, or the general public. See UHH-TIO FOF ¶¶952-953. The credible and substantial evidence in the record demonstrates that the TMT Project will not be materially detrimental to the public health, safety, and welfare, in satisfaction of HAR § 13-5-30(c)(8). See UHH-TIO FOF ¶¶937-1000; UHH-TIO COL ¶¶273-293.
			The alleged observations are not scientifically or logically verifiable and not demonstrated by admissible evidence, or otherwise the weight given to such testimony and exhibits is of little significance due to its lack of reliable probative value and/or materiality in connection with the criteria or legal issues to be resolved in this case.
31	11	Kaholokula stated that Native Hawaiians are intrinsically tied to land and are obligated as descendants of the ‘āina (land) to protect it in perpetuity. Tr. Feb. 23, 2017, vol: 40 pg: 118, at 19-21. Thus, Dr. Kaholokula stated that if Native Hawaiians are not able to express these spiritual, physical, and other aspects of well-being in caring for land, the non-expression can threaten their physical and mental health. Tr. Feb. 23, 2017, vol: 40 pg: 120, at 1 – 3.	See response to proposed finding of fact 30, page 11, above.
32	11	Kaholokula contended that Mauna Kea is a symbol to recognize Native Hawaiian ancestry and the strong identity to heritage, culture, practice and spirituality. (Tr. Feb. 23, 2017, vol: 40 pg: 121, at 2 – 7, 13-15). Further, Kaholokula contends that the mitigation measures offered by UHH is causing more distress to Native Hawaiians. Id. As such, he concludes that	See response to proposed finding of fact 30, page 11, above.

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33	11	<p>the proposed land use, will be materially detrimental to the public health, safety and welfare of, and in particular, the Hawaiian community. Tr. Feb. 23, 2017, vol: 40 pg: 126, at 14 - 19.</p> <p>Even with the implementation of mitigation measures, the TMT project would continue to have a substantial impact on a cultural site and traditional and customary practices. This conclusion is based on the following:</p> <ul style="list-style-type: none"> <li>a. There is no nexus between the actual harm (adverse impacts to a cultural site and to traditional and customary practices) and the mitigation measures. The cultural harm caused by the actual presence of the massive TMT structure is not compensated by providing substitute resources. The Community Benefit Package (CBP) and the \$1 million in funding is an external and separate measure that does not minimize the actual and adverse harm that will be occur at the proposed site. UHH EIS at 147.</li> <li>b. The National Park Service expressed its concerned about the deteriorous impacts the TMT will have on the national resources of MSRK. UHH EIS at 15.</li> <li>c. There is no evidence of any nexus between the off-site measures that provide benefits to certain members of the public and the adverse impact to a cultural site and to traditional and customary practices.</li> <li>d. There is no evidence that measures such as providing funding to schools or organizations would actually mitigate the harm that the TMT would cause to an impact that would be less than substantial.</li> <li>e. The Applicant has submitted no credible evidence that the mitigation measures would result in no substantive impact to a cultural site or to traditional and customary practices.</li> <li>f. The Applicant failed to provide any witnesses in the contested case hearing with any experience or training in impacts to and mitigation of traditional and customary practices or cultural resources.</li> </ul>	<p>Inaccurate/False. Misrepresentation. Unsupported/Unsubstantiated.</p> <p>The credible and substantial evidence in the record, and as already discussed in this response, demonstrates that there will not be a substantial adverse impact to customary sites and/or alleged customary and traditional practices. See UHH-TIO FOF ¶503-610; ¶611-744; ¶775-795; UHH-TIO COL ¶177-217.</p> <p>The use of mitigation measures is a universally recognized and widely adopted means of lessening (not eliminating) otherwise adverse impacts in land use projects. Ex. C-6 (WDT Callies) at 8. The Hawai'i Supreme Court has held that the BLNR may properly consider a project's mitigation measures in determining whether the proposed land use meets the eight criteria. UH-TIO FOF 116-122. The TMT Project's mitigation measures are extensively discussed in the UHH-TIO FOF/COL. See UHH-TIO FOF ¶¶304-330.</p>
34	12	Prof. Flores stated that they went in with bulldozers. They cut a new road.	Misleading. Presented out of context. Mr.

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		The excavated. The drilled into the aina there. They cut and graded the road coming down to the site. This as all done before DLNR even consented to a sublease. (Tr. Jan. 30, 2017 vol: 32 pg: 50, 6-10)	Sanders testified that a right of entry agreement was entered into with UHH and a grading permit was also obtained prior to any ground disturbing. <u>See</u> Tr. 1/3/17 at 27:2-7; 27:22-28:1. Moreover, archaeological monitors were present during all ground disturbing activity and observed all the material excavated or removed during ground searching. <u>See</u> Tr. 12/20/16 at 78:22-79:6.
35	12	Prof. Flores stated that he and his family had to set an ahu up in a ceremony because their older daughter got impacted before they got there. (Tr. Jan. 30, 2017 vol: 32 pg: 50, 21-23)	<p>Not credible. These are beliefs, not facts. There is no actual or independent evidence to support this proposition. This also supports the undeniable conclusion that the ahu referred to by the Flores-Case Ohana was erected after the TMT Project site was selected.</p> <p><u>See also</u> response to proposed finding of fact 34, page 12 above.</p> <p>The alleged observations are not scientifically or logically verifiable and not demonstrated by admissible evidence, or otherwise the weight given to such testimony and exhibits is of little significance due to its lack of reliable probative value and/or materiality in connection with the criteria or legal issues to be resolved in this case.</p>

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36	12	Prof. Flores stated that there was a spirit on the land that grabbed her and took her down, and was going to take her soul and spirit away for what had happened to the land. (Tr. Jan. 30, 2017 vol: 32 pg: 51, 24-2)	<u>See response to proposed finding of fact 35, page 12, above.</u>
37	12	Prof. Flores stated that they had to go into ceremony to stop that and listen to what the land was saying. The land was disturbed, and not only the land, everything connected to the land on many different levels was disturbed, and they had to go into ceremony; otherwise they would have lost their daughter that day. (Tr. Jan. 30, 2017 vol: 32 pg: 51, 3-9)	<u>See response to proposed finding of fact 35, page 12, above.</u>
38	12	Prof. Flores stated that his family shouldn't have been put into the position of asking for forgiveness for what the construction crews, the operators, and those who consented this, they shouldn't have been put into that position. (Tr. Jan. 30, 2017 vol: 32 pg: 51, 10-15)	<u>See response to proposed finding of fact 35, page 12, above.</u>
39	12	Prof. Flores stated that he and his family asked those connected to the land, both in the physical and the spirit, to forgive those who did this on the land, to forgive the construction crew operators, to forgive those who consented. They asked for harm not to fall upon them or their families -- and they asked for their daughter to be released from this. (Tr. Jan. 30, 2017 vol: 32 pg: 52, 24-7)	<u>See response to proposed finding of fact 35, page 12, above.</u>
40	13	Prof. Flores agreed that none of the mitigations measures being proposed in the CDUA will reduce the harm to him as a cultural practitioner. (Tr. Jan. 30, 2017 vol: 32 pg: 94, 18-5)	Unsupported/Unsubstantiated. Not credible. <u>See response to proposed finding of fact 33, page 11, above.</u>
41	13	When asked, "What is your perspective as an educator and professor of the TMT projects proposal of awarding funds for educational activities and scholarships in exchange for building the telescope?" Prof. Flores stated: "My perspective on the matter as an educator and a professor - for over 30 years as an educator and particularly education in the Hawaiian Studies programs and education with Hawaiian students as well, that this is a blatant community bribe. They are offering money to destroy." (Tr. Jan. 30, 2017 vol: 32 pg: 156, 13-22)	Unsupported/Unsubstantiated. Not credible. <u>See response to proposed finding of fact 33, page 11, above.</u>  Moreover, the significant economic benefits that will be afforded by the TMT Project was developed and shaped in large part to respond to community input about ensuring that the TMT Project assist in improving the socio-economic landscape

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			of Hawaii Island . See UHH-TIO FOF ¶330.
42	13	<p>The credible and substantial testimony of PUEO established that there is a need for educational opportunities and that the TMT Project will help address that need. See UHH-TIO FOF ¶¶284-290</p>	<p>Inaccurate/False. Unsupported/Unsubstantiated. Not credible. The credible and substantial evidence in the record, as established in the UHH-TIO FOF/COL and as addressed in this response, supports the opposite conclusion. Mr. Flores merely offers his unsupported beliefs. These unsupported beliefs are not facts.</p>
43	13	<p>Prof. Flores agreed that the proposed TMT construction and development within the environmentally and culturally sensitive landscape of Mauna Kea would cause adverse impacts and irreparable harm upon the Akua, the Kupua, and the Kupuna of Mauna Kea. (Tr. Jan. 30, 2017 vol: 32 pg: 187, 17-22)</p>	<p>Unsupported/Unsubstantiated. Like Ms. Kihoi, Ms. Sleightholm did not conduct any alleged practices on Mauna Kea until October 7, 2014, when she ascended Mauna Kea for the specific purpose of protesting the TMT Project. See UHH-TIO FOF ¶746.</p>
			<p>The credible and substantial evidence in the record demonstrates that the TMT Project will not be materially detrimental to the public health, safety, and welfare, in satisfaction of HAR § 13-5-30(c)(8). See</p>

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		UHH-TIO FOF ¶937-1000; UHH-TIO COL ¶273-293.	The Astronomy Precinct is not an undeveloped “pristine” area. UH-TIO FOF 859-864.
44	13	Leina‘ala Sleighholm agreed that she felt had no choice but to participate in this Contested Case Hearing. (Tr. Feb.14, 2017 vol: 35 pg: 32, 9:42 15-9:43 18)	<u>See response to proposed finding of fact</u> , 43, page 13, above.
45	13	Leina‘ala Sleighholm stated that she felt her soul was breaking in the process. That she had never felt anything so deep before, and it just was crushing. She couldn’t breathe”. (Tr. Feb.14, 2017 vol: 35 pg: 34, 9:46 14-18)	<u>See response to proposed finding of fact</u> , 43, page 13, above.
46	13	Leina‘ala Sleighholm agreed that she would consider the trauma she felt being arrested while in pule and protecting the Mauna, an adversarial health effect. (Tr. Feb.14, 2017 vol: 35 pg: 43, 10:02 21-25)	<u>See response to proposed finding of fact</u> , 43, page 13, above. Ms. Sleighholm chose to be arrested. Others, including Petitioners E. Kalani Flores and Pua Case, have “protected” Mauna Kea without being arrested. See Tr. 2/15/17 at 179:1-19.
47	13	Leina‘ala Sleighholm agreed that it was a spiritual threat that led her to protect the Mauna. (Tr. Feb.14, 2017 vol: 35 pg: 44, 10:03 6-9)	<u>See response to proposed finding of fact</u> , 43, page 13, above.
48	14	When asked how she felt after being arrested on April 2, 2015, Leina‘ala Sleighholm stated that she felt violated, and like her body was desecrated. (Tr. Feb. 14, 2017 vol: 35 pg: 55, 10:19 19-2)	<u>See response to proposed finding of fact</u> , 43, page 13, above. Ms. Sleighholm chose to be arrested. Others, including Petitioners E. Kalani Flores and Pua Case, have “protected”

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			Mauna Kea without being arrested. <u>See Tr.</u> 2/15/17 at 179:1-19.
49	14	Leina‘ala Sleighholm stated that when she was arrested on September 9, 2015, her purpose for going up was to support the kia‘i that were holding vigil, and pule and support them. (Tr. Feb.14, 2017 vol: 35 pg: 55, 10:21 22-2)	<u>See response to proposed finding of fact,</u> 43, page 13, above.  Ms. Sleighholm chose to be arrested. Others, including Petitioners E. Kalani Flores and Pua Case, have “protected” Mauna Kea without being arrested. <u>See Tr.</u> 2/15/17 at 179:1-19.
50	14	Leina‘ala Sleighholm stated that she was hand in hand in a wahine prayer circle when the DOCARE Officers broke their pule to arrest them. (Tr. Feb.14, 2017 vol: 35 pg: 56, 10:22 10-25)	<u>See response to proposed finding of fact,</u> 43, page 13, above.  Ms. Sleighholm chose to be arrested. Others, including Petitioners E. Kalani Flores and Pua Case, have “protected” Mauna Kea without being arrested. <u>See Tr.</u> 2/15/17 at 179:1-19.
51	14	Ruth Aloua stated that injury goes on even if the TMT wasn’t put up there, and having the TMT there would be an insult to injury. (Tr. Feb. 15, 2017 vol. 36 pg: 43, 9:55 18-25)	<u>See response to proposed finding of fact,</u> 43, page 13, above.
52	14	Ruth Aloua testified that her arrests on Mauna Kea were oppressive, offensive and brutal attacks that have caused her trauma (Ex.F4 at 2)	<u>See response to proposed finding of fact,</u> 43, page 13, above.  Ms. Aloua chose to be arrested. Others, including Petitioners E. Kalani Flores and Pua Case, have “protected” Mauna Kea without being arrested. <u>See Tr.</u> 2/15/17 at

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53	14	Ruth Aloua testified that her arrests on Mauna Kea have created fear of law enforcement officers and concern for personal safety during ceremony (Ex.F4 at 2)	<p>179:1-19.</p> <p><u>See</u> response to proposed finding of fact, 43, page 13, above.</p>
54	14	Ruth Aloua stated that on April 2, 2015, on Mauna Kea, she was arrested as a kanaka maoli of these lands for protecting an elder. (Tr. Feb. 14, 2017 vol. 35 pg: 207, 3:48 3-6 ) 55. Ruth Aloua testified that she had no arrest record prior to her two arrests on Mauna Kea. (Tr. Feb. 14, 2017 vol. 35 pg: 207, 3:50 25-2)	<p><u>See</u> response to proposed finding of fact, 43, page 13, above.</p> <p><u>See</u> response to proposed finding of fact, 43, page 13, above.</p>
56	14	Ruth Aloua agreed that she felt that there was a threat to her ohana because of the sacredness of the Mauna. (Tr. Feb. 14, 2017 vol. 35 pg: 222, 4:11 3-6)	<p><u>See</u> response to proposed finding of fact, 43, page 13, above.</p>
57	14	Hawane Rios stated when she was arrested on Sept. 9, 2015, and ripped apart from the prayer circle she was in, she felt like she had spun out of her body. Like her soul, and spirit, were so ‘eha and felt so much pain. Every single part of her felt the pain of being disrespected in that way, where her right to pray, her rights to be on her Mauna, because she is a kanaka maoli, were violated. (Tr. Feb. 15, 2017 vol. 36 pg: 129, 1:34 3-15)	<p><u>See</u> response to proposed finding of fact, 43, page 13, above.</p> <p><u>See</u> response to proposed finding of fact, 43, page 13, above.</p>

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58	14	Hawane Rios stated that as a seer she has been given guidance and instruction from the spirits from Mauna Kea. If the TMT project is built, she would not know how to repent, apologize, to the spirit realm for letting them down. There is a great ancestral responsibility to ensure the directions received are followed. (Tr. Feb 15, 2017 vol.36 at 185, 3:00 11-16)	Not credible. <u>See UHH-TIO FOF ¶603.</u>  The alleged observations are not scientifically or logically verifiable and not demonstrated by admissible evidence, or otherwise the weight given to such testimony and exhibits is of little significance due to its lack of reliable probative value and/or materiality in connection with the criteria or legal issues to be resolved in this case.
59	15	Hawane Rios stated that the events that occurred on the mountain with the spirit that incorporated her body during ceremony could have happened to an unknowing person potentially causing them harm. (Tr. Feb 15, 2017 vol.36 pg:147, 2:05, 18-9 )	Not credible. <u>See UHH-TIO FOF ¶603.</u>
60	15	Hawane Rios stated that she and others are hurt and traumatized by events that have occurred through the Protect Mauna Kea movement. (Tr. Feb 15, 2017 vol.36 pg:134, 1:43 3-10)	Incomplete.  Misleading. Presented out of context.  Unsupported/Unsubstantiated.
61	15	Hawane Rios stated that the trauma she has experienced has affected her life physically, spiritually, emotionally and mentally. She is working on healing these emotions with healing through forgiveness and love. (Tr. Feb 15, 2017 vol.36 at 136-138, 1:47 2-12)	UH-TIO FOF 603.  Incomplete.  Misleading. Presented out of context.  Unsupported/Unsubstantiated.
62	15	Hawane Rios stated that the trauma and pain that would be caused by the	UH-TIO FOF 603.  The credible and substantial evidence in

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			the record demonstrates that the TMT Project will not be materially detrimental to the public health, safety, and welfare, in satisfaction of HAR § 13-5-30(c)(8). See UHH-TIO FOF ¶¶937-1000; UHH-TIO COL ¶¶273-293.
1	15	Kihoi timely and properly filed a request to be admitted as a party contesting the issuance of a conservation district use permit to the Applicant. HAR § 13-1-29.	Not in dispute.
2	15	interests of Kihoi and her daughter and the injury that they have and would face from the TMT project, Kihoi has standing. Life of the Land v. Land Use Commission, 63 Haw. 166, 174, 623 P.2d 431, 439 (1981); Akau v. Olohana Corp., 65 Haw. 383, 388, 652 P.2d 1130, 1134 (1982); Pele Defense Fund v. Puna Geothermal Ventures, 77 Hawai'i 64, 67, 881 P.2d 1210, 1213 (1994); Ka Pa`akai O Ka`aina v. Land Use Commission, 94 Hawai'i 31, 7 P.3d 1068 (2000); HAR §13-1-31(b)(2) and (c).	The standing of Ms. Kihoi to participate in this contested case hearing is not in dispute.  The credible and substantial evidence in the record demonstrates that the TMT Project will not be materially detrimental to the public health, safety, and welfare, in satisfaction of HAR § 13-5-30(c)(8). See UHH-TIO FOF ¶¶937-1000; UHH-TIO COL ¶¶273-293.
3	15	It is sufficient for standing purposes for an individual, Simpson, 170 F.3d 1092, 1096 (1999).	Incomplete.  The standing of Ms. Kihoi to participate in this contested case hearing is not in dispute.
4	15	In addition, Kihoi has standing based on her traditional and customary practices that would be impaired by the TMT project. Public Access Shoreline Hawaii v. Hawai'i County Planning Comm'n, 79 Hawai'i 425,	The standing of Ms. Kihoi to participate in this contested case hearing is not in dispute. However, and again, Ms. Kihoi

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	903 P.2d 1246 (1995) ("PASH").	presented no evidence that any of her alleged customary and traditional practices occur in area E of Mauna Kea. Indeed, as noted above, Ms. Kihoi testified at the CCH that she had never even been to the proposed TMT Project site until the groundbreaking ceremony on October 7, 2014. Her purported practices after the groundbreaking ceremony do not constitute the reasonable exercise of any alleged cultural practice and is not a reason to deny the CDUA.	
5	16	Finally, Kihoi has standing based on her constitutional rights. Hawai'i State Constitution Article XI §§ 1 and 9 and Article XII § 7.	<u>See response to proposed conclusion of law 4, page 15 above.</u>
6	16	"The applicant shall have the burden of demonstrating that a proposed land use is consistent with the above criteria [in HAR § 13-5-30(c)]." HAR § 13-5-30(C); Mauna Kea Power v. BLNR, 76 Hawai'i 259, 265 (1994); See also, In re CDUA for Hawaiian Electric Company, Inc. to Construct a 138-kV Transmission Line at Wa`ahila Ridge.	Incomplete. UHH-TIO COL ¶¶78 through 83 (burden of proof legal framework).
7	16	Failure to meet any one of the criteria in HAR § 13-5-30(c) is sufficient to deny a CDUA. Given the aesthetic, environmental, cultural, recreational, and religious	Incomplete. Unsupported/Unsubstantiated. UHH-TIO FOF ¶¶ 344; UHH-TIO COL ¶¶122 through 127. Ms. Kihoi does not cite to any legal authority that requires the TMT Project to meet all eight criteria in HAR § 13-5-30(c). Regardless, as demonstrated in the UHH-TIO FOF/COL, the TMT Project meets all eight criteria in HAR § 13-5-30(c).
8	16	The applicant's burden is compounded by the duties imposed by the public trust doctrine, pre-existing native Hawaiian rights and the State	Unsupported/Unsubstantiated. Partially Irrelevant/Inapplicable. UHH/TIO dispute

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			<p>Constitution. In Re Wai`ola O Moloka`i Inc., 103 Hawaii 401, 429, 83 P.3d 664, 692 (2004); In Re Water Use Permit Applications, 94 Hawaii 97, 142 and 160, 9 P.3d 409, 454 and 472 (2000) (“Wai`ahole”).</p>
11	16	<p>The proposed TMT will be materially detrimental to the public health, safety, and welfare. HAR § 13-5-30(c)(8). The applicant shall have the burden of demonstrating that a proposed land use is consistent with the above criteria.</p> <p>a. The purpose of the conservation district is to “conserve, protect, and preserve the important natural resources of the State through appropriate management and use to promote their long-term sustainability and the public health, safety and welfare.” HRS § 183C-1 and HAR § 13-5-1; see also Curtis v. Board of Appeals, 90 Hawai`i 384, 396 (1999); H. Stand. Comm. Rep. No. 395, 1961 House Journal 855 and S. Stand Comm Rep. No. 937, 1961 Senate Journal 883.</p> <p>b. The conservation district rules define “natural resource” to include cultural sites. HAR § 13-5-2.</p> <p>c. Land in the conservation district is intended to tolerate the least degree of development. Life of the Land v. Land Use Comm'n, 63 Haw. 166, 170 n.3 (1981). See also, HRS chapter 205 and HRS § 205-2(a)(1) and HRS § 205-2(e). The conservation district was intended for low-impact uses such as “farming, flower gardening, operation of nurseries or orchards, growth of commercial timber, grazing, recreational or hunting pursuits, or residential uses.” HRS § 183C-4(d). d. Rather than conserving, protecting and preserving natural beauty, scenic vistas, quietness and a cultural site, the</p>	<p>that the Public Trust Doctrine applies to the TMT Project. Nevertheless, even if it does apply, the TMT Project complies with the Public Trust Doctrine. See UH-TIO FOF ¶¶ 1001-1014; UHH-TIO COL ¶¶ 295-323. The TMT Project also complies with <u>Ka Pa`akai</u> and other case law protecting the reasonable exercise of customary and traditional native Hawaiian practices. See UHH-TIO COL ¶¶ 324-385.</p> <p>Inaccurate/False. Unsupported/Unsubstantiated. The credible and substantial evidence in the record demonstrates that the TMT Project will not be materially detrimental to the public health, safety, and welfare, in satisfaction of HAR § 13-5-30(c)(8). See UHH-TIO FOF ¶¶ 937-1000; UHH-TIO COL ¶¶ 273-293.</p> <p>The credible and substantial evidence in the record demonstrates that the TMT Project satisfies the eight criteria under HAR § 13-5-30(c). See UH-TIO FOF ¶¶ 344 -432, 937-1000; UH-TIO COL ¶¶ 126-293.</p>

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		<p>Applicant's proposal adversely affects them in significant ways.</p> <p>b. Based on the testimony presented, the Applicant cannot meet the eighth criteria because it has failed to account for the injuries that have and will occur should the TMT proceed. No evidence provided thus far have accounted for these injuries.</p> <p>c. Kihoi and others like her have suffered injuries already due to the current state of Mauna Kea, the arrests and the potential construction of the TMT.</p>	
17	17	<p>The Applicant has not met its burden of proving by a preponderance of the evidence that its project is consistent with HAR § 13-5-30(c).</p>	<p>Inaccurate/False. Unsupported/Unsubstantiated. <u>See</u> generally UHH-TIO FOF/COL.</p>
20	17		<p>Kihoi's Proposed FOF/COL overwhelmingly consists of claims of generalized harm and trauma. It provides no credible analysis as to how the TMT Project fails to satisfy any of the eight criteria under HAR § 13-5-30(c)</p>
21	17	<p>"The scope of Hawaii's Public Trust Doctrine is set forth in Article XI, section 1 of the Hawaii'i Constitution and provides: For the benefit of present and future generations, the State and its political subdivisions shall conserve and protect Hawaii's natural beauty and all natural resources, including land, water, air, minerals and energy sources, and shall promote the development and utilization of these resources in a manner consistent with their conservation and in furtherance of the self-sufficiency of the State. All public natural resources are held in trust by the State for the benefit of the people." <i>Morgan v. Planning Dept., County of Kaua'i</i>, 104 Hawai'i 173, 184 n. 12, 86 P.3d 982, 993 n.12 (2004).</p>	<p>Irrelevant/Inapplicable. UHH/TIO dispute that the Public Trust Doctrine applies to the TMT Project. Nevertheless, even if it does apply, the TMT Project complies with the Public Trust Doctrine. <u>See</u> UHH-TIO FOF ¶¶ 1001-1014; UHH-TIO COL ¶¶ 295-323</p>
			<p>Irrelevant/Inapplicable. UHH/TIO dispute that the Public Trust Doctrine applies to the TMT Project. Nevertheless, even if it does</p>

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		Ct. of Alpine City, 658 P.2d 709, 719 (Calif. 1983); Muench v. Public Service Commission, 53 N.W.2d 514, 520 (Wisconsin 1952), affirmed on rehearing 55 N.W.2d 40 (1952).	apply, the TMT Project complies with the Public Trust Doctrine. <u>See UHH-TIO FOF ¶ 1001-1014; UHH-TIO COL ¶ 295-323</u>
22	17	The public trust doctrine requires that cumulative impacts be considered. Kelly v. 1250 Oceanside Pttrs., 111 Hawai'i 205, 227, 140 P.3d 985, 1008 (2006). Wai'āhole, 94 Hawai'i at 143, 9 P.3d at 455 (“Specifically, the public trust compels the state duty to consider the cumulative impact . . .”).	Irrelevant/Inapplicable. UHH/TIO dispute that the Public Trust Doctrine applies to the TMT Project. Nevertheless, even if it does apply, the TMT Project complies with the Public Trust Doctrine. <u>See UHH-TIO FOF ¶ 1001-1014; UHH-TIO COL ¶ 295-323</u>
23	17	“The state also bears an affirmative duty . . . to protect public trust uses whenever feasible.” Wai'āhole, 94 Hawai'i at 141, 9 P.3d at 453; State v. Central Vt. Ry., 571 A.2d 1128, 1132 (Vermont 1989)(“[T]he state’s power to supervise trust property in perpetuity is coupled with the ineluctable duty to exercise this power.”). This duty requires that the state affirmatively act to ensure that public trust resources are not impaired. Wai'āhole at 139, 9 P.3d at 451; Orion Corp. v. State, 747 P.2d 1062, 1073 (Wash. 1987). Under the public trust, the state has both the authority and the duty to preserve the rights of present and future generations in the public trust resources of the state. Wai'āhole at 141, 9 P.3d at 453.	Irrelevant/Inapplicable. UHH/TIO dispute that the Public Trust Doctrine applies to the TMT Project. Nevertheless, even if it does apply, the TMT Project complies with the Public Trust Doctrine. <u>See UHH-TIO FOF ¶ 1001-1014; UHH-TIO COL ¶ 295-323</u>
24	18	The balancing of uses “must conform to article XI, section 1’s mandate of ‘conservation.’” Wai'āhole, 94 Hawai'i at 428 n.43, 9 P.3d at 454 n.43	Irrelevant/Inapplicable. UHH/TIO dispute that the Public Trust Doctrine applies to the TMT Project. Nevertheless, even if it does apply, the TMT Project complies with the Public Trust Doctrine. <u>See UHH-TIO FOF ¶ 1001-1014; UHH-TIO COL ¶ 295-323</u>
25	18	A developer has no right to use public land to impair public trust resources. King v. Oahu Railway & Land Co., 11 Haw. 717, 725 (1899).	Irrelevant/Inapplicable. UHH/TIO dispute that the Public Trust Doctrine applies to the TMT Project. Nevertheless, even if it does apply, the TMT Project complies with the Public Trust Doctrine. <u>See UHH-TIO FOF</u>

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26	18	Given the impacts of the project on public trust resources, approval of the TMT would violate the Board of Land and Natural Resources' duties pursuant to the public trust doctrine.	<p>¶ 1001-1014; UHH-TIO COL ¶ 295-323</p> <p>Irrelevant/Inapplicable. UHH-TIO dispute that the Public Trust Doctrine applies to the TMT Project. Nevertheless, even if it does apply, the TMT Project complies with the Public Trust Doctrine. See UHH-TIO FOF ¶ 1001-1014; UHH-TIO COL ¶ 295-323</p>
27	18	Article XII § 7 of the Hawai‘i Constitution provides that: “The State reaffirms and shall protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by ahupua‘a tenants who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778, subject to the right of the State to regulate such rights.”	<p>Not in dispute, but it should be noted that the customary and traditional practices that are protected under the Hawai‘i Constitution, article XII, section 7, are specific and limited. It does not include all <u>cultural</u> practices.</p> <p>The TMT Project complies with <u>Ka Pa‘akai</u> and other case law protecting the reasonable exercise of customary and traditional native Hawaiian practices. See UHH-TIO COL ¶ 324-385.</p>
28	18	Article XII § 7 of the Hawai‘i Constitution requires the “State and its agencies to preserve and protect customary and traditional practices of native Hawaiians.” Ka Pa‘akai O Ka‘aina v. Land Use Comm'n, 94 Hawai‘i 31, 45, 7 P.3d 1068, 1082 (2000). The Board of Land and Natural Resources is under “an affirmative duty” to “protect these rights and to prevent any interference with the exercise of these rights.” Id.	<p>Misleading. Presented out of context. The TMT Project complies with <u>Ka Pa‘akai</u> and other case law protecting the reasonable exercise of customary and traditional native Hawaiian practices. See UHH-TIO COL ¶ 324-385.</p> <p>See response to proposed conclusions of law 27, page 18, and 28, page 18, above.</p>
29	18	“[T]he ancient usage of lands practiced by Hawaiians did, in fact, carry over into the new system of property rights established through the Land Commission.” Public Access Shoreline Hawai‘i v. Hawai‘i County Planning Commission, 79 Hawai‘i 425, 449, 903 P.2d 1246, 1270 (1995). “[T]he right of each ahupua‘a tenant to exercise traditional and customary	

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30	18	practices remains intact . . ." Id. at 450, 903 P.2d at 1271.	
30	18	The applicant for a permit is obligated to demonstrate affirmatively that the proposed use will not affect Native Hawaiian rights. Wai'ola at 442, 83 P.3d at 705; In re Contested Case Hearing on the Water Use Permit Application Filed by Kukui, 116 Hawai'i 481, 509, 174 P.3d 320, 348 (2007).	Inaccurate/False. The TMT Project complies with <u>Ka Pa‘akai</u> and other case law protecting the reasonable exercise of customary and traditional native Hawaiian practices. See UHH-TIO COL ¶324-385.
31	19	The most feasible means of protecting the traditional and customary practices exercised on Mauna Kea would be to deny the conservation district use application for the ATST.	Inaccurate/False. Unsupported/Unsubstantiated. This is the CDDA for the TMT Project. The CDDA approval for the ATST has already occurred and many of the same arguments raised in this case have already been rejected by the Hawai'i Supreme Court in <u>Kilakila 'O Haleakala v. Bd. of Land and Natural Resources</u> , 138 Hawai'i 383, 382 P.3d 195 (2016).  The TMT Project complies with <u>Ka Pa‘akai</u> and other case law protecting the reasonable exercise of customary and traditional native Hawaiian practices. See UHH-TIO COL ¶324-385

BOARD OF LAND AND NATURAL RESOURCES

FOR THE STATE OF HAWAII

IN THE MATTER OF

A Contested Case Hearing Re Conservation District Use Permit (CDUP) HA-3568 for the Thirty Meter Telescope at the Mauna Kea Science Reserve, Kaohe Mauka, Hamakua District, Island of Hawaii, TMK (3) 4-4-015:009

Case No. BLNR-CC-16-002

**CERTIFICATE OF SERVICE**

**CERTIFICATE OF SERVICE**

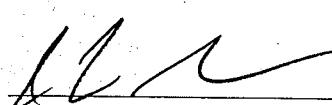
The undersigned hereby certifies that the foregoing document was served upon the following parties

by the means indicated:

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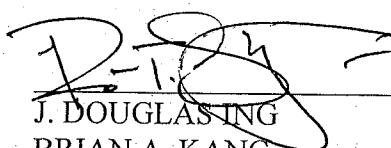
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